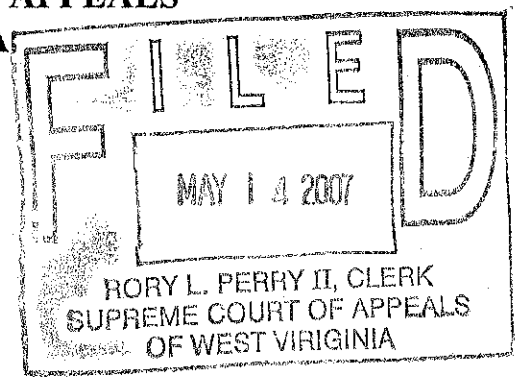
IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



MARY H. WETZEL, Individually and as Executrix of the Estate of ROBERT H. WETZEL,

Appellants,

v.

APPEAL NO.: ~~063491~~ 33337

EMPLOYERS SERVICE CORP. OF WEST VIRGINIA,

Appellee.

BRIEF OF APPELLEE

EMPLOYERS SERVICE CORPORATION OF WEST VIRGINIA,

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I. PROCEDURAL HISTORY:

On November 16, 1992, Robert Wetzel was injured as a result of being exposed to Toluene Diisoocyanate ("TDI") during the course of his employment with Chemical Leaman. Mr. Wetzel's injury was found to be compensable by the Workers' Compensation Commissioner ("Workers' Compensation") and Mr. Wetzel began receiving temporary total disability benefits on November 20, 1992. However, Chemical Leaman was self-insured for workers' compensation benefits pursuant to *W.Va. Code* §23-2-9.[1] As such, Chemical Leaman was responsible for administering Mr. Wetzel's claim and paying any benefits once his claim was ruled compensable by Workers' Compensation.

On August 1, 1987, Chemical Leaman entered into a contract with Employer Service Corporation ("ESC") whereby ESC would administer Chemical Leaman's self-insured workers' compensation program. Accordingly, ESC processed Mr. Wetzel's Workers' Compensation claim on behalf of Chemical Leaman.

By Order dated March 29, 1994, Workers' Compensation closed Mr. Wetzel's claim after finding that he had a 0% permanent partial disability ("PPD"). On April 5, 1994, Mr. Wetzel protested the March 29,1994 Order to the Workers' Compensation Office of Judges. Mr. Wetzel died on September 5, 1995. Thereafter, on January 25, 1996, the Office of Judges affirmed the March 29, 1994 Order. On January 29, 1996, a notice of appeal was filed on behalf of Mr. Wetzel's estate to the Workers' Compensation Appeal Board.[2] On August 30, 1996, the Workers' Compensation Appeal Board affirmed the final Order of the Office of Judges. On September 27, 1996, Mr. Wetzel's estate filed a petition of appeal to this Court. This Court rejected the petition.

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[1] *West Virginia Code* §23-2-9 was amended by 2007 West Virginia Law Ch. 257 (S.B. 595).

[2] The appeal brief to the Workers' Compensation Appeal Board was filed on April 22, 1996.

On or about January 3, 1996, Appellant Mary Wetzel (plaintiff below) filed a Workers' Compensation claim for widow benefits. On June 5, 1996, Workers' Compensation denied Ms. Wetzel's claim. The denial of Plaintiff's dependent claim was affirmed by both the Office of Judges and the Workers' Compensation Appeals Board. Thereafter, Plaintiff filed a petition of appeal to this Court. This Court accepted the petition and by Order dated December 28, 2000, this Court reversed the final decision of the Workers' Compensation Appeal Board and remanded the case to Workers' Compensation with directions to enter an Order awarding plaintiff widow benefits.

On September 9, 1996, during the time she was protesting Workers' Compensation's 0% PPD award to her husband and Workers' Compensation denial of her claim, Plaintiff filed this action against ESC claiming that ESC improperly administered Mr. Wetzel's claim because ESC had denied certain requests for payments as being unrelated to Mr. Wetzel's compensable claim or as being unauthorized by Workers' Compensation.[3] On August 15, 2006, the trial court granted summary judgment in ESC's favor. *See Order, R. at 748 and attached hereto as Exhibit 1.* It is from this Order that Plaintiff now appeals.

II. UNCONTESTED FACTS:

1. ESC contracted with Chemical Leaman to administer Chemical Leaman's self-insured workers' compensation program.

2. Pursuant to its contract with Chemical Leaman, ESC processed Mr. Wetzel's workers' compensation claim following his November 16, 1992 exposure to TDI.

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[3] Out of 139 requests for payments, ESC denied 16 as being unrelated to Mr. Wetzel's compensable claim, 4 as being unauthorized by Workers' Compensation, and 6 as being duplicate charges. None of the denials were protested to the Workers' Compensation Office of Judges or the Workers' Compensation Appeal Board.

3. Although ESC administered Mr. Wetzel's workers' compensation claim, all decisions relating to whether any particular treatment, i,e., seeing a specialist, medications, etc., in connection with Mr. Wetzel's claim would be approved were made exclusively by Workers' Compensation.

4. During the time ESC administered Mr. Wetzel's claim, it received 139 requests for payments. ESC paid each invoice for treatment that was determined by Workers' Compensation to be related to Mr. Wetzel's compensable claim.

5. As such, of the 139 requests for payment, ESC denied 26. Sixteen of the 26 were for office visits to Dr. Emch. Dr. Emch testified that those 16 office visits were not related to Mr. Wetzel's compensable claim and that ESC acted properly in denying payment for those 16 visits.

6. Four of the 26 requests denied were for medications that Workers' Compensation had specifically refused to authorize in the treatment of Mr. Wetzel's compensable injury.

7. The remaining 6 of the 26 requests denied were for duplicate charges.

8. An employer has a statutory right to deny an claim for treatment or benefits. *W.Va. Code* §23-4-1(c). If a claim for treatment or benefits is denied by a self-insured employer, the employee is permitted to file a complaint with the Workers' Compensation Commissioner. *See* 85 C.S.R. 5-2.1. The employer can be fined up to $5,000 by the Commissioner for any failure to properly pay benefits. *See* 85 C.S.R. 5-4.1. Plaintiff never filed a complaint with the Workers' Compensation Commissioner regarding any denial of payment made by ESC on behalf of Chemical Leaman.

9. No expert in this case has testified that any act or omission on the part of ESC caused, contributed or hastened Mr. Wetzel's unfortunate death.[4]

10. ESC is not an insurance company. Chemical Leaman is not an insurance company. No contract of insurance exists that would provide coverage for Mr. Wetzel's bodily injury claim against Chemical Leaman. As such, there was no "contractual obligation" to pay Mr. Wetzel's workers' compensation claim.

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[4]Plaintiff's expert, attorney Jay Marty Mazeska, testified that the denials of payment for the office visits ***may have*** had an adverse affect on Mr. Wetzel's relationship with his treating physician. *See Mazeska depo., pp. 25, 26, R. at 650.* However, Mr. Wetzel's treating physician, Dr. Edward Emch, testified that the denials ***did not affect*** his treatment of Mr. Wetzel. *See Dr. Emch depo. pp. 12, 18, 19., R. at 728.* Dr. Emch further testified that he had assured Mr. Wetzel that even if Workers' Compensation never paid his invoices, he would not seek payment from him. *Id.*

III. BACKGROUND:

As the administrator of Chemical Leaman's self-insured workers' compensation program, ESC assisted in the processing of compensation claims filed by Chemical Leaman's employees, including Mr. Wetzel's.[5] When processing the claims, ESC used the International Classification of Disease, Ninth Clinical Modification or "ICD-9" which is an objective industry standard used to determine whether treatments or medications are related to an injury which was found to be compensable by Workers' Compensation.[6] *See Affidavit of Lois J. Atkins, R. at 737.* It is undisputed, even by Plaintiff's experts, that ESC ***did not have any authority to determine what claims were compensable or to authorize any specific treatment in relation to a compensable claim***, such as referrals to specialist or types of medications, in connection with a compensable claim. *See Sue Howard, Esq. depo., pp. 11,12, 20-22, 31-35, R. at 638; Jay Marty Mazeska, Esq. depo., pp. 12-13, 23-26, R. at 650.*

During the time ESC administered Mr. Wetzel's claim on behalf of Chemical Leaman, it received 139 requests for payments. *See ESC Print Payment Detail, R. at 422.* Of those 139

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[5] Plaintiff states that "EEC (sic) assumes all claims handling responsibilities including processing, reviewing and approving claims and requests for medical services, expenses, etc., made by individual employees." *Appellant Brief, pg. 2.* By so stating, Plaintiff is attempting to imply that ESC had control over whether a claim was deemed compensable or whether certain medications or treatments, including referrals to specialists, were approved in connection with any claim deemed compensable. This is simply not true. As stated herein, only Workers' Compensation can approve and authorize medications and referrals to specialists in connection with the treatment of a compensable claim. All ESC did and all ESC contracted to do with Chemical Leaman was to process claims of Chemical Leaman's employees that were deemed compensable by Workers' Compensation pursuant to Workers' Compensation guidelines. *See Contract, R. at 716.*

[6] The ICD-9 code system is an objective standard which is routinely used by Workers' Compensation and which is recognized by the West Virginia Legislature as being a valid standard. *See W.Va. § 33-15B-3(a)(2).*

requests, only 26 were denied by ESC. *Id.* Of the 26 requests denied, 16 were for office visits for conditions that were unrelated to Mr. Wetzel's compensable injury. *Id.* Each of the invoices for the 16 denied office visits had a diagnosis code of rheumatoid arthritis and/or pneumonitis. *Id.* As ***will*** be set forth more fully herein, Dr. Edward Emch, Mr. Wetzel's ***treating physician*** and the physician who submitted the 16 invoices, testified that these conditions were ***unrelated to Mr. Wetzel's compensable injury*** and that ESC ***acted properly in denying the invoices.*** *See Dr. Emch depo., pp.8-18, 21-23, R. at 728.*

Four of the 26 requests denied were for medications, Prozac and Prednisone, which were not authorized by Workers' Compensation in the treatment of Mr. Wetzel's compensable claim. *See ESC Print Payment Detail, R. at 422.* Not only were these medications not authorized by Workers' Compensation, they had been ***specifically denied by Workers' Compensation*** in the treatment of Mr. Wetzel's compensable injury.[7] As such, both of Plaintiff's experts, attorneys Sue Howard and Jay Marty Mazeska, testified that ***ESC's denial of payments for these drugs was proper.*** *See Sue Howard, Esq. depo., pp. 11, 12, 20-22, 34, 35, R. at 638; Jay Marty Mazeska, Esq. depo., pp. 12, 13, 23-26, R. at 650.* Accordingly, Plaintiff's statement that ESC's denial of payment for the medications "Prozac and Prednisone" "lacked a basis in law or fact" is simply a mischaracterization of the facts of this case.[8] *Appellant Brief, p. 3.* The remaining six requests for payments denied by

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[7] Dr. Emch testified that during the time he was treating Mr. Wetzel, he was also treating two other gentlemen for work-related TDI-exposure. Workers' Compensation denied payment for Prozac and Prednisone and office visits for these gentlemen as well. *See Emch depo., pp. 12-16 R. at 728.*

[8] Plaintiff also alleges that ESC denied payment for the medication, Rhenatrex. *Appellant Brief, p.3.* However, there is no record of Mr. Wetzel being prescribed Rhenatrex. Mr. Wetzel was prescribed Rheumatrex on November 26, 1993 for which an invoice in the amount of $62.75 was submitted to ESC. The cost submitted exceeded the amount allowed under by Workers'

ESC were denied as being duplicate charges. *See ESC Print Payment Detail, R. at 422.* Plaintiff has not criticized ESC for these denials.

On September 9, 1996, Plaintiff filed a Complaint against ESC setting forth the following causes of action based upon the "denial of benefits" as set forth above: (1) Outrage/ Intentional Infliction of Emotional Distress; (2) Violations of the West Virginia Unfair Trade Practices Act; and (3) Negligence. On December 9, 1996, ESC filed a Motion for Summary Judgment on the grounds that Plaintiff failed to assert a viable cause of action because the Workers' Compensation system was Plaintiff's exclusive remedy and because ESC is not an "insurer" or "in the business of insurance" so as to be subject to the West Virginia Unfair Trade Practices Act. *See ESC's Motion for Summary Judgment and Supporting Memorandum, R. at 168 and 170, respectively.* Thereafter, on November 21, 2002, ESC filed a supplemental memorandum in support of its Motion for Summary Judgment in order to bring relevant new decisions from this Court to the trial court's attention.[9] On December 6, 2002, ESC's Motion was heard by Judge Karl in the Circuit Court of Marshall County, West Virginia. Following the hearing, the parties engaged in significant discovery. As a result, on February 16, 2004, ESC filed a second supplemental memorandum in support of its Motion for Summary Judgment in which it argued that not only did Plaintiff not have a ***legal basis*** for her claims against ESC but that she also did not have a ***factual basis*** for her claims. Plaintiff did not file a response to ESC's supplemental memorandum or to ESC's second supplemental memorandum until June 8, 2005,

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Compensation and, therefore, the cost was reduced to $56.47. ESC issued payment in the amount of $56.47. *See ESC Print Payment Detail, R. at 422.*

[9] In its Supplemental Memorandum, ESC addressed this Court's decisions in *Cobb v. E.I. duPont deNemours and Co.*, 209 W.Va. 463, 549 S.E.2d 657 (1999) and *Hawkins v. Ford Motor Company,* 211 W.Va. 487, 566 S.E.2d 624 (2002), which were and are directly on point.

two days prior to the hearing during which the trial court addressed ESC's supplemental memorandums. Consequently, ESC did not have an opportunity to reply to Plaintiff's Response prior to the June 10, 2006 hearing. However, because Plaintiff's Response contained several misstatements of fact and mischaracterizations of law, ESC filed a Reply to Plaintiff's Response on July 19, 2005.[10] Thereafter, on August 15, 2006, the trial court granted ESC's Motion for Summary Judgment and entered an Order finding, *inter alia*, (1) that, at all relevant times, ESC was acting as the agent of Chemical Leaman and was therefore entitled to the same protection as Chemical Leaman under the Workers' Compensation system; and (2) that ESC was not an insurer or in the business of insurance and was therefore not subject to the UTPA. *See 8/15/06 Order, R. at 748 and attached hereto as Exhibit 1.* For the reasons set forth below, the trial court's granting of summary judgment in ESC's favor was proper and should be affirmed.

IV. STANDARD OF REVIEW:

It well-settled that this Court reviews Summary Judgment rulings pursuant to a *de novo* standard of review. *See Syl. pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E. 2d 755 (1994).*

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[10] Many of the misstatements of fact and mischaracterizations of law set forth in Plaintiff's response were repeated in Plaintiff's Petition and, again, in Plaintiff's Appellant brief. As an example of one the more egregious misstatements of fact, Plaintiff states that two experts, Dr. Michael Blatt and Dr. Edward Emch, testified that "ESC's improper claims handling did, in fact, contribute to his death." *Appellant's brief, pg. 1.* This statement is not true. Dr. Blatt, an expert retained by Plaintiff, testified that ***he had no opinion*** as to whether ESC improperly handled Mr. Wetzel's claim and Dr. Emch testified that ***ESC acted properly.*** . *See Blatt depo. pp. 11-13, attached hereto as Exhibit 2 and Dr. Emch depo. pp. 33-34, R. at 728.*

V. ARGUMENT:

A. The Workers' Compensation system is Plaintiff's exclusive remedy.

1. At all times relevant hereto, ESC was acting as the agent of Chemical Leaman and is therefore entitled to immunity under *West Virginia Code* §§23-2-6 and 23-2-6(a).

The Workers' Compensation system is the exclusive remedy for employees, like Mr. Wetzel, who are injured in the course and scope of their employment. *West Virginia Code* §23-4-2(d)(1) provides, in pertinent part, as follows:

> It is declared that enactment of this chapter and the establishment of the Workers' Compensation system in this chapter was and is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as herein expressly provided . . .; that the immunity established in sections 6 and 6(a) of this chapter is an essential aspect of this Workers' Compensation system; that the intent of the legislature in providing immunity from common law suit was and is to protect those so immunized from litigation outside the Workers' Compensation system except as herein expressly provided.

Id.

> With regard to the above-described immunity, *W.Va. Code §23-2-6* provides:
> Any employer subject to this chapter shall subscribe and pay into the Workers' Compensation Fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided shall not be liable to respond in damages at common law or by statute for the injury or death of any employee however occurring, after so subscribing or electing.

Id. The immunity afforded to an employer by *§23-2-6* is expressly extended to the employer's agents and representatives. Specifically, *W.Va. Code §23-2-6(a)* provides:

> The immunity from liability set out in the preceding section (§23-2-6) ***shall extend*** to every officer, manager, ***agent***, ***representative***, or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

W.Va. Code §23-2-6(a)(emphasis added).

At all times relevant hereto, ESC was the "agent" or "representative" of Chemical Leaman for purposes of Chemical Leaman's self-insured Workers' Compensation program and is entitled to the same immunity afforded to Chemical Leaman in connection with any claims arising from the administration of the self-insured Workers' Compensation program. This Court in *Warden v. Bank of Mingo*, 176 W.Va. 60, 341 S.E.2d 679 (1985) defined an "agent" as "a person authorized by another to act for or in place of him; one entrusted with another's business." *Id.*

Because Chemical Leaman was self-insured for Workers' Compensation, it was required to under *W.Va. Code §23-2-9* to process any Workers' Compensation claims filed by its employees. To satisfy this duty, Chemical Leaman hired ESC to process the claims for it. Accordingly, it is clear that ESC "acted in the place of" or "conducted business" on behalf of Chemical Leaman. Thus, as the trial court set forth in its August 15, 2006 Order, ESC was the "agent" or "representative" of Chemical Leaman and is entitled to the same immunity afforded to Chemical Leaman under the Workers' Compensation system. *See 8/14/06 Order, pg. 4, R. at 748 and attached hereto as Exhibit 1.*

Plaintiff argues that the trial court erred in finding that ESC was the agent of Chemical Leaman and cites to this Court's decision in *Deller v. Naymick*, 176 W.Va. 108, 342 S.E.2d 73 (1986) for the proposition that to be an agent, a person must provide his services exclusively to the employer.[11] *Appellant Brief, pg. 10.* However, as correctly recognized by the trial court, *Deller*

[11] In *Deller*, an injured employee brought suit against a doctor hired by the employer to treat a compensable injury. This Court found that the doctor was an "employee" of the employer within the meaning of *W.Va. Code §23-2-6(a)* because he provided services to the employer "largely to the exclusion of otherwise special employment" at a regular salary and because he was "on call" for the employer. *342 S.E.2d at 76.*

defines who is an *employee* under *§23-2-6(a)*, not who is an *agent* or *representative*.[12] Plaintiff argues by making this distinction, the trial court violates the "rule" that this "state's workers' compensation laws must be liberally construed in favor of compensation not immunity." *Appellant Brief, pg. 12.* This is simply not the "rule." As this Court recently recognized in *Bias v. Eastern Assoc. Coal Corp.*, 220 W.Va. 190, 640 S.E.2d 540 (W.Va. 2006), the Workers' Compensation statute provides employers with "***sweeping immunity***" and it should therefore be strictly construed without the creation of additional exceptions to its applicability. *Id. (emphasis added). See also, State ex rel. City of Martinsburg v. Sanders*, 219 W.Va. 228, 632 S.E.2d 914 (2006)("traditional theories of recovery are simply not available . . . since Workers' Compensation in intended to insulate [an employer] from incurring liability based upon common law grounds . . ."). Plaintiff further argues that the manner in which the trial court defines the word "agent" "practically guarantees immunity" and states that it is so broad that "any professional or, indeed, anyone performing services on a contract basis would be covered and entitled to assert immunity." *Id. (emphasis in original).* In support of this argument, Plaintiff asks this Court to take the trial court's ruling to its "logical extreme" and states that, if it does so, even Chemical Leaman's computer repairman would be immune from suit if he "negligently dropped a monitor down a stairwell" injuring Harry Wetzel. *Appellant Brief, p. 13.* While Plaintiff's argument certainly is "extreme," it is not "logical."

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[12] If Plaintiff's assertion was correct, then an agency relationship could never be found to exist between an emergency room doctor and a hospital if the doctor provided his services to more than one hospital or between an insurance agent and an insurance company if the agent solicited insurance on behalf of more than one company. This would certainly lead to an "absurd result." *Appellant Brief, p. 13.*

In the instant case, despite Plaintiff's assertions to the contrary, ESC is not arguing and the trial court did not find that ESC was Chemical Leaman's agent for all purposes and entitled to the same immunity as Chemical Leaman under all circumstances. Instead, all that ESC is arguing and all that the trial court found is that ESC was the agent of Chemical Leaman for the purpose of Chemical Leaman's self-insured workers' compensation program *only* and is therefore entitled to the same immunity as Chemical Leaman *only* in connection with claims arising from the administration of Chemical Leaman's self-insured workers' compensation program.[13] Thus, at any extreme, ESC would not be immune from liability if it dropped a computer monitor on an employee of Chemical Leaman.

Because ESC was the agent of Chemical Leaman, Plaintiff's claims against ESC for the alleged negligent handling of Mr. Wetzel's claim are barred by the provisions contained in *W.Va. Code §§23-4-6 and 23-2-6(a)*. Therefore, the Worker's Compensation system is Plaintiff's exclusive remedy. *See Cobb v. E.I. duPont deNemours and Co.*, 209 W.Va. 463, 549 S.E.2d 657 (1999) (employee could not recover in action brought against employer for fraudulent misrepresentations to Workers' Compensation claims analyst absent any evidence that information provided by employer was false or that the claims analysts relied upon it); *Persinger v. Peabody Coal Co.*, 196 W.Va. 707, 474 S.E.2d 887 (1996); *Deller v. Naymick*, 176 W.Va. 108, 342 S.E.2d 73 (1986).

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[13] As will be set forth more fully herein, this Court has recognized that the immunity afforded under *W.Va. Code §§23-2-6* and *23-2-6(a)* extends to the ***handling*** of a compensable claim by the employer or the employer's agents or representatives. *See Persinger v. Peabody Coal Co.*, 196 W.Va. 707, 474 S.E.2d 887 (1996); *Cobb v. E.I. duPont deNemours and Co.*, 209 W.Va. 463, 549 S.E.2d 657 (1999).

2. Plaintiff has failed to produce any evidence that would overcome the immunity afforded to ESC under *West Virginia Code* §§23-2-6 and 23-2-6(a).

Plaintiff has not and cannot establish the essential elements of a fraud claim against ESC so as to deny ESC the immunity afforded to it under the Workers' Compensation system. As this Court first recognized in *Persinger*, *supra*, even though a claim may be for the alleged mishandling of benefits and not for the negligent injury, the exclusive remedy is still the Workers' Compensation system unless a ***very stringent test*** was satisfied. *Id. at 898, 899.* In so doing, this Court recognized that because an employer has a statutory right to contest an employee's claim, it was narrowly construing the cause of action to those employees who allege "fraudulent misrepresentation against the employer." *Id at 897.* As such, this Court set forth the circumstances under which an employee could seek damages outside the Workers' Compensation system in connection with an employer's handling of a claim as follows:

> We hold that an employee's cause of action against his or her employer for fraudulent misrepresentation concerning the employee's worker's compensation claim must be ***pled with particularity and must be supported by factual allegations identifying the employer's particular acts or circumstances which distinguish the intentional tort of fraudulent misrepresentation from the employer's negligent misrepresentation or mere delay in processing or payment of said claim***, the latter two of which are not sufficient to support an employee's independent cause of action. More specifically stated, in order for a plaintiff employee to prevail on the ***narrowly construed*** cause of action by the employee against an employer for fraudulent misrepresentation concerning the employee's worker's compensation claim, the employee must (1) plead his or her claim with particularity, specifically identifying the facts and circumstances that constitute the fraudulent misrepresentation, and (2) prove by clear and convincing evidence all essential elements of the claim, including the injury resulting from the fraudulent conduct. A plaintiff employee is not entitled to recover unless the evidence at trial is persuasive enough for both the judge and jury to find substantial, outrageous and reprehensible conduct which falls outside the permissible boundary of protective behavior under the statute. ***If the pleadings or evidence adduced is insufficient to establish either of the two factors stated above, the trial court may dismiss the action pursuant to Rule 12(b), Rule 56, or Rule 50 of the West Virginia Rules of Civil Procedure.***

Id at 888, 889. (emphasis added). Thus, the mere delay in payment or other conduct related to the "botched processing" of a compensation claim does not cause an employer or its agent to lose the exclusivity defense. *Id.*

This Court reaffirmed its *Persinger* decision in *Cobb, supra*, by again finding that an employee could not recover in an action brought against his employer for making fraudulent misrepresentations regarding the Workers' Compensation claim. There, the plaintiff filed a claim for workers' compensation benefits alleging that she suffered certain injuries due to exposure to heavy concentrations of chemicals during her employment with duPont. Plaintiff's claim was processed by Mary Parsons, a claim analyst for the workers' compensation division. Consistent with regular Workers' Compensation procedures, Ms. Parsons requested that duPont complete and submit the employer section of plaintiff's Workers' Compensation claim form and a copy of its air monitoring records at the job-site where plaintiff worked. After reviewing all of the information provided by duPont and the plaintiff, Ms. Parsons denied plaintiff's claim. Plaintiff protested the denial of her claim to the Workers' Compensation Office of Judges.

While her claim was pending before the Workers' Compensation Office of Judges, plaintiff filed an action against duPont in the Circuit Court of Kanawha County alleging that duPont made fraudulent misrepresentation to Ms. Parsons which precluded plaintiff from receiving benefits. After a period of discovery, duPont moved for summary judgment which was granted by the trial court. Plaintiff appealed the decision contending that a material issue of fact existed as to whether the information conveyed by duPont to Ms. Parsons was false. The trial court ruled that plaintiff could

"not prove that the statements alleged to be false or fraudulent are indeed false." *Id.* [14]

This Court affirmed summary judgment in favor of the employer on the grounds that plaintiff's exclusive remedy was the Workers' Compensation system because she had failed to satisfy the essential elements for a fraud cause of action. Specifically, this Court found that: (1) the plaintiff could not show that duPont's statements to Ms. Parsons were false; and (2) even assuming that statements were misleading, plaintiff failed to show that Ms. Parsons relied on the statements when making her decision to reject the claim.[15] *Id.*

In the instant case, Plaintiff has failed to allege fraud at all much less with the particularity required by *Cobb* and *Persinger*. *See 8/15/06 Order, pg. 5, R. at 748 and attached hereto as Exhibit 1.* Instead, Plaintiff makes sweeping statements that ESC without a "basis in law or fact" failed to authorize Mr. Wetzel to see a specialist and failed to pay for "routine office visits" without ***any*** supporting evidence. *See Appellant Brief, p. 3.* Not only does Plaintiff make these statements without any supporting evidence, Plaintiff does so ***in contradiction*** of the evidence developed in this matter and ***in contradiction*** of the testimony of Plaintiff's own experts and relevant caselaw. Borrowing

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[14] The relevant communication conveyed by duPont to Ms. Parsons, which plaintiff claimed to be false, involved air monitoring samples. Plaintiff contended, without any evidence to support the contention, that the air monitoring samples were false or misleading.

[15] In her deposition, Mary Parsons testified that she made the decision to deny plaintiff's Workers' Compensation claim based on the plaintiff's medical evidence. At the time of her denial, Ms. Parsons made a contemporaneous log note which corroborated her deposition testimony. Plaintiff argued that Ms. Parsons' notes prove otherwise, and that the "defendant friendly" Ms. Parsons was not being truthful. However, this Court found that ***simply asserting that Ms. Parsons was not being truthful did not meet the requisite burden placed on plaintiff to establish a fraud cause of action once a Motion for Summary Judgment had been filed.*** *Id. (emphasis added).*

a phrase from page three (3) of the Appellant Brief, such conduct is, "in a word, egregious."[16]

In its role as administrator of Chemical Leaman's self-insured Workers' Compensation program, it is ***undisputed*** that ESC did not determine what injuries were compensable, whether employees could seek independent medical examinations or whether employees could undergo surgical procedures, treatment, or rehabilitation. *See Affidavit of Lois J. Atkins, R. at 737.* In fact, it is ***undisputed*** that ESC did not have the authority to authorize Mr. Wetzel to see a specialist. It is also ***undisputed*** that ESC did not have the authority to authorize the use of certain medications in the treatment of Mr. Wetzel's compensable injury.

Plaintiff's expert, Sue Howard, touted by Plaintiff as "one of the most experienced workers compensation attorneys in the Northern Panhandle and likely all of West Virginia" unequivocally stated that ***ESC did not have a duty or the authority to authorize Mr. Wetzel to see any specialist, to undergo any type of medical procedure, or to take any type of medication.***[17] As explained by Ms. Howard, only Workers' Compensation could make such authorizations.

Specifically, Ms. Howard testified as follows:

> Q. When you have a self-insured entity [for the purposes of Workers' Compensation], who has the ultimate decision-making power, if you will, of deciding whether treatment, a certain treatment, is authorized?
>
> A. Well, in general, workers' compensation makes decisions on authorization for treatment, but when it's a routine-type of treatment, such as an office visit, workers' compensation doesn't issue authorizations for routine office visits

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[16] Plaintiff states in Appellant Brief that "as a matter of law, EEC (sic) is required to apply the same standards for compensability and payment of benefits as the workers' compensation commissioner." *Appellant Brief, pg. 2.* Yet, incongruously, Plaintiff is asking this Court to hold ESC to a *higher* standard by requiring ESC, and therefore, Chemical Leaman, to pay for treatment that had been specifically denied by Workers' Compensation.

[17] Ms. Howard was identified by Plaintiff as both a fact and expert witness.

with authorized treating physicians. They'll authorize Dr. Emch to treat for example, but not send an order out that specifies that the claimant's entitled to ten office visits, for example. That's something the self-insured or the third-party administrator is to just process. It's been that way in every claim I can ever think of.

* * *

Q. ***If the authorized treating physician is treating the claimant for an unrelated condition would it be proper to deny in that instance, deny payment for that visit?***

A. ***That would definitely be proper.*** . . .[18]

* * *

Q. There are also several instances, I believe, four or six times where ***ESC denied payment for certain drugs because they were unauthorized. Do you have an opinion as to those denials?***

> A. ***...So, in general, if it's a medication that isnot authorized, then, certainly, [ESC] would have no duty to authorize that medication,*** and at the time that [Mr. Wetzel] died, we did have some requests for authorization for medication that were in litigation at that time, that those medications had been denied.

Q. ***All right. So, you don't have any specific criticism of ESC with regard to the denials for the payments regarding prescription drugs***?

A. ***I don't*** - - the complaints that I was hearing from [Mr. Wetzel] related more to the failure to pay for the office visits.

* * *

A. I mean, I know that there was a significant amount of money that the Wetzels paid out of their own pockets for his medication that they believed was related

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[18] As set forth herein, Mr. Wetzel's treating physician testified that the office visits for which ESC denied payment were for conditions unrelated to Mr. Wetzel's compensable injury. *See Dr. Emch depo., pp. 8-18, 21-23, R. at 728.*

to the injury, and I think those were the medications that were in litigation at the time that he died. But, certainly, if – the way that this process works, and it's in the statute, if the division authorizes something, the employer can protest that authorization, but still that service or that medication, whatever it may be, vocational rehabilitation, an award of indemnity benefits, if the division authorizes it or orders it paid, then it's paid as though it's not in litigation at all.

And the flipside is true. If [Workers' Compensation] den[ies] authorization for something or den[ies] payment for something and a claimant litigates, that doesn't mean that the claimant automatically is entitled to get those until the appeal process might order that that be provided.

* * *

Q. ***Next place is on page 12. You'll see the notations on the side where it says, "Denied medications are not authorized for Prozac, Prednisone and methylprednisolone"?***

A. ***That's another steroid. The bottom two are steroids, and, again, those were issues that were in litigation. But it is true that they, at the time, had been denied [by Workers' Compensation]..***

Q. ***So, you have no criticism of ESC not paying these or denial of payment of ESC?***

A. ***Correct.***

Q. . . . So, other than ESC denying payments for the office visits that we talked about, which are listed on page six and seven and nine, I believe, do you have any other criticism regarding ESC's handling of Mr. Wetzel's claim?

A. I don't have any that I can think of right now. My whole problem related to the denial to the denial of the payment for those office visits that were just clearly due to the compensable injury and were with the authorized treating physician.[19]

See Howard deposition, pp. 11,12, 20-22, 34-35, R. at 638. (emphasis added).

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[19]Again, despite Ms. Howard's lay opinion that the office visits were related, Mr. Wetzel's authorized treating physician opined that the office visits were ***not related*** to Mr. Wetzel's compensable injury.

Plaintiff also identified Jay Marty Mazeska, an attorney practicing primarily in the area of Workers' Compensation, as an expert. Mr. Mazeska likewise testified that ESC ***did not have a duty or the authority*** to authorize Mr. Wetzel to see a specialist or to authorize any type of medication in the treatment of Mr. Wetzel's compensable injury. On this issue, Mr. Mazeska testified as follows:

Q. . . . ***If seeing a specialist - - who authorizes whether a claimant can see a specialist or not?***

A. Is that the question, who authorizes - -

Q. Yes.

A. ***Well, ultimately the workers' compensation division; but the self-insured employer can pre-authorize that.***

Q. But if it's not pre-authorized or if they choose not to pre-authorize it - - let me back up. ***Does a third-party administrator have the discretion not to pre-authorize something?***

A. ***Sure.***

Q. ***And is there anything wrong with that; is that breaching any type of duty if they do not pre-authorize?***

A. ***No.***

* * *

Q. On page 12. Service date starting on July 30th, '94, and going down to August 4th of '94, there were four requests for payments for certain drugs that were denied because the medications were not authorized. You don't have any problem with that?

A. If it was after the Office of Judges' decision, no.

Q. ...if this was before the Office of Judges made a ruling, what would be your problem then?

A. Well, I believe the Prednisone had been - - had initially been authorized by the workers' compensation division. No, I'm sorry. No, the division had denied

authorization for the Prednisone.

Q. ***So, you have no problem with ESC denying payments for these drugs?***

A. ***Under the circumstances of the denial that was issued in March of '94, no.***

See Mazeska deposition, pp. 12-13, 23-26, R. at 650. (emphasis added).

In addition to Plaintiff's experts, ESC's expert, William Gerwig, an attorney practicing primarily in the areas of workers' compensation and social security, also testified that ESC, as a third-party administrator, did not have a duty or the authority to authorize any type of treatment for Mr. Wetzel. Mr. Gerwig testified as follows:

Q. Okay. To your understanding, what does ESC do?

A. ESC processes the payment of benefits that are directed by [Workers' Compensation] through pay orders. There may be circumstances where they pay for treatment through pay orders, but predominantly, I believe those treatments request the bills come directly from physicians and medical providers on service invoice forms, which are then processed to determine whether or not it's a covered treatment and an appropriate treatment based on the ICD9.

Q. Could you expand on that last part again about determining what's covered and what's not?

A. Well, there's a diagnosis code for every disorder. If something is submitted under a compensable diagnosis code, then there's – well, a computer program determines whether the treatment is reasonable and necessary for that particular diagnosis. So benefits could be denied if the diagnosis is unrelated to the claim based upon orders from [Workers' Compensation] of if the treatment is inappropriate.

Now, those decisions may be subject to or those payments or the responsibility to make those payments may be subject to change through litigation, but the initial determination is based on the diagnosis coded that have been ruled compensable in the ICD9.

* * *

Q. Sure, I mean, when answering the question is this particular treatment or medication related to or because of an injury, isn't the person who's qualified in the law to make that a decision a doctor?

A. Well, it's certainly a doctor's – that would ultimately be the decision that is made, but the initial determinations are based on predetermined classifications. Now, [Workers' Compensation] – I'm sorry – the office of judges is not bound by that. If a doctor can explain the appropriate relationship of a treatment to a particular diagnosis to their satisfaction, they can authorize that medication or that treatment, even though it is not found within the ICD9.

Q. Is the ICD9 incorporated by any part of the workers' compensation statute into the law of West Virginia?

A. It's certainly not mentioned in the statute, but it has been clearly recognized and adopted, and [Workers' Compensation] themselves use the code sections for purposes of compensability rulings or in their compensability rulings.[20]

Q. Okay. Would you agree that whether or not a treatment is reasonable or necessary under the circumstances is a decision for a doctor?

A. Initially it's – the recommendation has to come form a doctor, but ultimately it's going to be – the decision's going to be made somewhere in the workers' compensation system, either by the division or by the office of judges if they're asked to rule upon the appropriateness of that treatment, and they may very well rely on a medical opinion. And certainly the initial recommendation has to come from a doctor, but if you're asking me in terms of whether that – someone who's responsible for paying those bills must defer to the doctor on all occasions, that's not the case.

Q. What would be an appropriate basis for declining to defer to a doctor's recommendation that a treatment be had?

A. If the treatment is not listed among recognized appropriate treatments in the ICD9, that is an appropriate basis for initially denying payment for those services.

Q. If ESC should deny payment based on the ICD9 code, who then has the

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[20] Plaintiff's expert, Jay Marty Mazeska, testified that the ICD9 is "a valid tool" in making the determination to pay for treatment. *See Mazeska deposition, p. 26, R. at 650; See also, W.Va. Code §33-15B-3(a)(2).*

burden to establish the correctness of that action?

A. There are a couple of things that can be done. The doctor's first notified that the payment's not going to be made, and then he can try to explain -- either if it's a billing error, he can correct it. If it's not and there's some explanation as to why that service should be paid, he could try to explain that to . . ESC.

The other potential possibility, which is what I tend to do, is make a motion to the workers' compensation division to specifically authorize the treatment that has been requested. Then they will rule on it. Very likely the division will deny it as well for the same reasons, that it's not listed in the ICD9. And then the office of judges - - I would protest the denial.

The office of judges would consider the medical evidence regardless of the ICD9 classifications, and they would issue a ruling either approving or denying that, and it would be subject to appeal by - - to the appeal board of the supreme court.

* * *

Q. Okay. What is the basis for your opinion that the denials [for the office visits with Dr. Emch], two sets of them, . . . are reasonable?

A. Neither rheumatoid arthritis nor bronchitis have been made compensable diagnoses in the claim, and I'm assuming at this point that the billing submitted was for those conditions, and as non-compensable diagnoses, they should have been denied. And then ESC would - - should then notify the service provider that these services were being denied as non-compensable diagnoses.

* * *

Q. When ESC refuses to pay for treatment such as the one [for office visits with Dr. Emch], what has to be done for the claimant to protest that?

A. Well, it's the same problem you face whether an employer is self-insured or a subscriber to the fund. The division does not issue a protestable decision. They do exactly what ESC did, which is notify the provider that the service was non-compensable or the recommended treatment was not listed in the ICD9, whatever the case may be.

> Then I have to get a request from the physician for authorization for whatever service he has submitted a bill for. I then make a motion at the division to authorize that. If they will authorize it, then I have a basis for resubmitting the bill based on an order from the division. Typically the division will deny it, because they're using the same standards as everybody else, as ESC and all other service corporations. So I'll then have to file a protest to the denial and attempt to convince the office of judges that the diagnosis is appropriate, even though it may not be specifically listed in the ICD9.
>
> Once I get a ruling from the office of judges, then that would give me the authority to resubmit a new bill to the service provider or the division, whatever the case may be.

See Gerwig deposition, pp. 26-30, 51, 57-58, R. at 452.

Based on the testimony of Ms. Howard, Mr. Mazeska, and Mr. Gerwig, it is clear that ESC did not have a duty or the authority to authorize Mr. Wetzel to see any specialist, including a pulmonary specialist, as alleged by Plaintiff. It is also clear that ESC did not have a duty or the authority to authorize payment for medications which Workers' Compensation had not only *not authorized* but had specifically denied. The only criticism either Ms. Howard or Mr. Mazeska had of ESC's handling of Mr. Wetzel's claim is in connection with ESC's alleged improper denial of payment for "routine office visits" to Mr. Wetzel's treating physician, Dr. Edward Emch.[21] Thus, of the twenty-six (26) requests for payment which were denied by ESC, Plaintiff's experts only believe that sixteen (16) of the denials were improper. Importantly, however, Plaintiff's experts testified that the sixteen (16) denials were improper ***only if*** the office visits were related to Mr. Wetzel's compensable injury which Dr. Emch ***testified that they were not***. Dr. Emch testified during his deposition that based upon the diagnosis codes on the sixteen (16) invoices his office submitted, ***ESC acted appropriately in denying payment for the office visits***. The diagnosis codes listed on

[21]Dr. Emch was Mr. Wetzel's treating physician from February 1986 until the time of his death in September of 1995.

the sixteen (16) invoices were for rheumatoid arthritis, bronchitis, and/or pneumonitis all of which were ***unrelated*** to Mr. Wetzel's compensable injury, TDI exposure. Specifically, Dr. Emch testified as follows:

Q. Have you ever submitted an invoice to Workers' Compensation that was not paid or that was denied?

A. Yes.

* * *

Q. If it's denied because it is unrelated to the compensable injury, when you resubmit, how do you resubmit it? Do you resubmit the same bill, or do you change - -

A. No. We try to modify it to fit, obviously to get paid, whether you have to change the diagnosis slightly or pick another code because it's not appropriate on not recognized.

* * *

Q. Do you recall how many of your invoices were denied that you submitted for treatment rendered to Mr. Wetzel?

A. There was a considerable amount, because at the time I had three patients with TDI, chronic sensitization, and they were all being denied.

* * *

Q. The ones that were eventually paid, did you explain how the treatment was related to the TDI exposure? How did you get the bills to be paid?

A. We just resubmitted the bills. Sometimes I wrote a note explaining what was going on. In fact, the third person just got paid up last year, so I sat on them and I did not bill the patients themselves. I continued to try to get Workers' Comp to pay.

* * *

Q. Okay. So it wasn't just Mr. Wetzel's payments being denied for unrelated treatment because of the TDI exposure? You had other patients where similar treatments were also being denied.?

A. Yeah, I had two, two more.

* * *

Q. So if Workers' Compensation or Employers Service Corporation denied an invoice because it had diagnosis code for rheumatoid arthritis, would that be a correct denial?

A. Assuming - - yes, assuming that TDI didn't cause the rheumatoid arthritis.

Q. Do you believe in this case that the TDI exposure caused the rheumatoid arthritis?

A. In this case it's kind of hard to call because it wasn't a typical presentation for rheumatoid arthritis...

Q. Because it was a an atypical situation, do you believe ***if Workers' Compensation or Employers Service Corporation denied the invoice for rheumatoid arthritis as being unrelated, would that be a reasonable action?***

A. ***Yes***. At the time what had happened is we had - - he couldn't go to a specialist because of lack of income, so we couldn't get him to go to a specialist to help my diagnosis or to relate it to his injury.

Q. If I recall correctly from reviewing the file, you had recommended at certain points that Mr. Wetzel see a specialist and made that recommendation to Workers' Compensation; correct?

A. Yes.

Q. Were any of those requests granted?

A. No. There's no – there's no record of any rheumatologist, for instance, in the chart.

Q. ***All of the requests you made for Mr. Wetzel to see a specialist you made directly to Workers' Comp?***

A. ***Yes***.

Q. ***The other two patients whom you were treating for the similar conditions, did you ever recommend that they see specialists?***

A. ***Yes.***

Q. ***Were they granted?***

A. ***No.***

* * *

Q. . . . On August 2nd of 1993 there were two invoices denied as being unrelated, because they were billed with a diagnosis code of rheumatoid arthritis. I believe you said if that was denied, that would be reasonable, because it was not related to the TDI or was questionable?

A. Yeah. I was unable to determine, because we didn't have specialist opinion.

Q. On September 3rd and September 22nd of 1993 and October 7th and November 4th there were ***a series of invoices denied, because they were billed with a diagnosis code of bronchitis and pneumonitis.***

A. ***That should have been - - it probably was bronchitis and pneumonitis, but it was not TDI-induced, so that's probably what that is.***

Q. ***Would that be reasonable, then, for those charges to be denied?***

A. ***Yeah.*** If it was just a viral bronchitis or if it was not a chemical pneumonia, that would not be compensable.

Q. There's another series of treatments on December 3rd, 1993, January 7th, '94, February 7th, '94, February 18th, '94, March 7th, '94, and April 4th, '94, for office visits. They were all denied, because they were billed with a diagnosis code of bronchitis and pneumonitis.

A. That should have been - - well, I think my billing clerk should have billed - - they should have probably been billed chemical pneumonitis.

Q. ***If they were billed with a diagnosis code of bronchitis and pneumonitis, that would - -***

A. ***Not being specific enough, I would not expect that to be compensable.***

Yeah, throughout here it's - - in the charts if I thought it was related to the TDI, I noted it as the diagnosis or tried to, so those must have just been infections and should have just been office calls.

* * *

Q. Okay. I know you said, going back to your notes, you believe everything you treated - - the bronchitis was all chemical and was all related to the TDI exposure, correct?

A. Yeah. It's all listed by me as TDI-related.

Q. As far as you know, Workers' Compensation did not have access to your records; correct?

A. No.

Q. So if all they were going on were your bills that had a diagnosis code that wasn't related - -

A. Correct.

Q. – to the chemical exposure, they would have no way of knowing that it was related?

A. No, they would not.

Q. ***And any actions they took based upon your bills would be reasonable?***

A. ***Yeah.***

See Dr. Emch depo., pp. 8-18, 21-23, R. at 728. (emphasis added).

Because Plaintiff's own experts testified that ESC did not have a duty or the authority to authorize Mr. Wetzel to see any specialist or to authorize any medication, Plaintiff's claims against ESC for negligence and intentional infliction of emotional distress are based solely on ESC's denial of certain office visits with Mr. Wetzel's treating physician, Dr. Emch. However, as set forth above, Dr. Emch testified that based on the information he supplied to Workers' Compensation and/or to

ESC, ESC's denials ***were reasonable.***[22] Accordingly, Plaintiff has failed to produce any evidence that ESC acted negligently much less fraudulently as required to overcome the immunity afforded to it under *W.Va. Code §§23-2-6 and 23-2-6(a)* and relevant caselaw. Therefore, even assuming *arguendo* ESC is not entitled to immunity, Plaintiff has not and can not offer any facts to support her allegations that ESC violated any duty in its handling of Mr. Wetzel's claim. Accordingly, the trial court's decision granting summary judgment on this issue was proper.

3. Immunity afforded under *West Virginia Code §§23-2-6* and *23-2-6(a)* extends to the handling of Workers' Compensation claims.

As set forth herein, this Court has specifically addressed the issue of whether immunity afforded under *W.Va. Code §23-2-6 and 28-2-6(a)* extends to the handling of a workers' compensation claim and has found that it does. *See Persinger, supra, Cobb, supra.* Nevertheless, Plaintiff asks that this Court to ignore its own precedent and to adopt the Louisiana decision, *Weber v. State*, 635 So.2d 188 (La. 1994). In support thereof, Plaintiff argues that *Weber* is "most similar" to the case at bar. *See Appellant Brief, p. 16.* Again, Plaintiff makes a statement that is simply not true.

In *Weber*, a widow brought a wrongful death action against her late husband's employer, the State of Louisiana, alleging that the State intentionally refused to authorize a heart transplant which resulted in her husband's death. There, the plaintiff's husband, Charles Weber, Sr., had contracted an occupational disease in 1984 and the State began paying workers' compensation benefits. In March of 1988, Mr. Weber's treating physician advised Mr. Weber and the State that Mr. Weber's

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[22]Additionally, as set forth in Lois Atkins' Affidavit, which was not contested by Plaintiff, ESC acted in accordance with the standards set forth in the ICD-9 and with the authorizations provided by Workers' Compensation. *See Lois Atkins' Affidavit, R. at 737.*

condition was terminal unless he had a heart transplant. When the State refused to authorize the transplant, Mr. Weber submitted the matter to the Louisiana Office of Worker's Compensation ("OWC"). The OWC *recommended* that the State pay for the transplant but the State again *refused. Id. (emphasis supplied).* Mr. Weber did not receive the transplant and subsequently died.

Weber is not even remotely similar to the case at bar. Here, ESC, unlike the State of Louisiana, had ***no authority to authorize*** any type of treatment for Mr. Wetzel. Here, unlike Louisiana's OWC, the Workers' Compensation division ***specifically denied*** the requests from Mr. Wetzel's treating physician to allow Mr. Wetzel to see a specialist and to authorize certain medications. Here, unlike the State of Louisiana, ESC ***never refused*** to pay for and ***never failed*** to pay for any treatment that had been a***pproved*** by Workers' Compensation. Accordingly, even if *Weber* had any precedential value, it does not have any application to the facts of this case.

B. ESC is not an "insurer" or "in the business of insurance" and is, therefore, not subject to the West Virginia Unfair Trade Practices Act §33-11-4.

In her Complaint, Plaintiff alleges that ESC violated various provisions of the West Virginia Unfair Claims Settlement Practices Act W. Va. Code §33-11-1, *et seq.* ("UTPA") and various provisions of the corresponding regulations found in Title 114, Series 14 of the West Virginia Legislative Rules of the Insurance Commissioner. West Virginia law is clear that neither of these provisions are applicable to ESC.

First, the Legislative Rules of the Insurance Commissioner do not apply to cases involving Workers' Compensation. Section 114-14-1(c) states:

> This regulation applies to all persons and to all insurance policies and insurance contracts *except Workers' Compensation insurance*, title insurance and fidelity and surety bonds.

(*emphasis supplied*).

Second, ESC is not an "insurer" and is not "in the business of insurance." As such, it is not subject to the UTPA. It is uncontroverted that Chemical Leaman was self-insured for purposes of Workers' Compensation. Interestingly, Plaintiff does not dispute that Chemical Leaman is not subject to the UTPA. However, because Chemical Leaman contracted with ESC to administer its self-insured Workers' Compensation program, Plaintiff argues that ESC is subject to the UTPA. Plaintiff's argument is completely without merit.

In *Hawkins v. Ford Motor Company*, 211W.Va. 487, 566 S.E.2d 624 (2002), this Court was confronted with the issue of whether the UTPA was applicable to Ford, a self-insured automobile manufacturer. The trial court had refused to allow the plaintiffs to amend their Complaint to assert a UTPA cause of action against Ford. On appeal, plaintiffs relied heavily upon two decisions from this Court which imposed upon self-insurers statutory requirements which insurance companies are obligated to satisfy, *Korzun v. Yi*, 207 W.Va. 377, 532 S.E.2d 646 (2002) and *Jackson v. Donahue*, 193 W.Va. 587, 457 S.E.2d 524 (1995). Plaintiffs also cited the withdrawn opinion of the United States District Court for the Northern District of West Virginia in *White v. Lowes Home Center, Inc.*, *29* F. Supp.2d 330 (N.D. W.Va. 1998), *withdrawn (May 25, 1999)* in which the Court had held that the UTPA applied to a self-insurer.

This Court, however, declined to extend the UTPA to self-insurers. As stated by Justice Maynard:

> We hold that the UTPA and the tort of bad faith apply only to those persons or entities and their agents who are engaged in the business of insurance. In other words, absent a contractual obligation to pay a claim, no bad faith cause of action exists, either at common law or by statute. A self-insured entity is not in the business of insurance.

566 S.E.2d at 629.

Plaintiff, however, argues that *Hawkins* is inapposite because, in this case, she "has not sued Ford, or Chemical Leaman -- rather she has sued ESC." *Appellant Brief, pg. 19.* Plaintiff's argument completely ignores the reasoning upon which *Hawkins* is premised. "Absent a contractual obligation to pay a claim, no bad faith cause of action exists, either at common law or by statute." *Hawkins, at 629.* It is undisputed that Chemical Leaman did not have a contractual obligation to pay Mr. Wetzel's claim. To argue that ESC had a *greater obligation* to pay Mr. Wetzel's claim than his employer did is simply nonsensical.

Plaintiff further argues that "the proper question is not whether ESC is an insurer, but whether it engaged in the business of insurance" and states that "clearly the claims handling activities EEC (sic) performs on a daily basis constitutes the business of insurance." *Id.* However, if Plaintiff's argument is to be accepted, then any company who is self-insured and "processes" its own claims would be in the business of insurance and thus subject to the UTPA which is the exact result rejected by this Court in *Hawkins.* What Plaintiff fails to acknowledge is that if there is no insurance contract, there can be no contractual obligation and, without a contractual obligation, there can be no violation of the UTPA.[23]

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[23] Judge Andrew MacQueen provided the following analogy during his deposition in this matter:

Q. Okay. I understand its your opinion that the UTPA does not apply to ESC.

Furthermore, Plaintiff's argument in this regard was specifically rejected by the United States District Court for the Southern District of West Virginia in the 2003 decision, *Stafford EMS, Inc. v J.B. Hunt Transport, Inc.*, 270 F.Supp.2d 773 (S.D.W.Va. 2003). There, an owner of an ambulance service filed suit against J.B. Hunt, a self-insured company, and its adjusting service, Custard Insurance Adjusters, Inc., alleging, *inter alia,* that the two companies violated the UTPA. The district court, applying *Hawkins*, held that neither J.B. Hunt nor Custard Insurance Adjusters could be held liable under the UTPA. In so holding, the district court reasoned:

A. Probably the biggest thing is that this is not insurance or the business of insurance under the statute. This is - - this ESC is not an indemnitor. It didn't sell insurance policies. It did not undertake to pay losses. It administers a self-insurance program by Chemical Leaman. Self-insurance under the [Hawkins v. Ford Motor. Co.] case is not covered by the UTPA.

Q. Okay. Let me ask you a question about that. Could Allstate avoid the effect of the UTPA on its practices by outsourcing the claims handling?

A. No

Q. I mean, if Allstate hired ESC - -

A. Allstate is an insurance company. If they sell the policy of insurance and undertake to indemnify somebody, that's insurance. If on the other hand you're paying it out of your own pocket and somebody else simply does the paperwork and makes the decision, it doesn't make it insurance. Although we call it self-insured, it isn't insurance. It's not a contract of indemnity. So if Allstate went to some private company, it's still an insurer, and it's agent is in the business of insurance. In this case, Chemical Leaman is not Allstate.

See Judge MacQueen's depo, R. at 474.

> While the *Hawkins* opinion makes no mention of the liability of independent adjusters under either the UTPA or the common law tort of bad faith, the court emphasized the absence of a contractual obligation to pay. Neither J.B. Hunt or its independent adjusters had any contractual obligation to pay the plaintiff's claim. Further, the claim being adjusted by [the independent adjuster] was not, strictly speaking, an insurance claim inasmuch as J.B. Hunt was self-insured.

Id. at 777 (citations omitted).

Likewise, in the instant case, ESC did not have a contractual obligation to pay Mr. Wetzel's claim. Accordingly, ESC is not subject to the UTPA and cannot be held liable thereunder. Therefore, the trial court's decision granting summary judgment on this issue was proper.

VI. CONCLUSION:

The uncontested facts in this matter establish that, at all times relevant hereto, ESC was acting as the agent of Chemical Leaman in connection with Chemical Leaman's self-insured workers' compensation program. The uncontested facts in this matter establish that ESC acted properly in its administration of Robert Wetzel's workers' compensation claim on behalf of Chemical Leaman. The uncontested facts in this matter establish that, as the agent of Chemical Leaman, ESC is immune from suit for any negligence claims arising from its administration of Mr. Wetzel's workers' compensation claim. The uncontested facts in this matter establish that ESC is not an insurance company and is not in the business of insurance and is, therefore, not subject to the Unfair Trade Practices Act. The uncontested facts in this matter establish that Plaintiff has failed to state a viable cause of action against ESC. For these reasons, the Circuit Court was correct in granting ESC's Motion for Summary Judgment. ESC therefore respectively submits that the Circuit Court's findings set forth in the August 15, 2006 Judgment Order should be AFFIRMED.

Respectfully submitted this 11th day of May, 2007.

EMPLOYERS SERVICE CORPORATION OF WEST VIRGINIA,

By Counsel.

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EXHIBIT
1

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

MARY H. WETZEL, Individually
and as Executrix of the Estate
of ROBERT H. WETZEL,

Plaintiffs,

v. CIVIL ACTION NO. 96-C-172K

EMPLOYERS SERVICES CORP.
OF WEST VIRGINIA,

Defendant.

FILED
2006 AUG 15 AM 10:00
DAVID R. FAIX

ORDER

On a former day came the parties, by counsel, upon defendant Employer Services Corporation of West Virginia's ("ESC") Motion for Summary Judgment. The Court has had the matter under advisement. Based upon the written briefs submitted and the corresponding oral arguments, after careful and mature consideration, and after a review of the applicable case law and statutory law, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff's decedent, Robert Wetzel, worked for Chemical Leaman Tank Lines as a truck driver.
2. Plaintiff alleges that the decedent was exposed to Touluene Diisocyanate ("TDI") on several different occasions, and that this exposure caused him to suffer respiratory problems.

3. After each exposure to TDI, Mr. Wetzel filed for and received Workers' Compensation benefits. Mr. Wetzel's last exposure to TDI occurred on November 16, 1992. Mr. Wetzel died on September 5, 1995.

4. Chemical Leaman was self-insured for Workers' Compensation benefits pursuant to West Virginia Code § 23-2-9.

5. ESC entered into a contract with Chemical Leaman to administer its self-insured Worker' Compensation benefit program. As the administrator of the program, ESC assisted Chemical Leaman in the processing of compensation claims and paperwork.

6. ESC did not determine: (1) what injuries were compensable; (2) whether employees could seek independent medical examinations; or (3) whether employees could undergo surgical procedures, treatment, or rehabilitation. ESC only determined, based upon an objective industry standard (the "International Classification of Disease, 9th Clinical Modification" or "ICD-9"), if certain treatments or medications were related to an injury which was found by the West Virginia Compensation Commissioner to be "compensable." The ICD-9 code system is an objective standard which is routinely used in practice by Worker' Compensation Commissioner and which is recognized by the West Virginia Legislature as being a valid standard. West Virginia Code § 33-15B-3(a)(2).

7. An employer has a statutory right to deny any claim for treatment or benefits. See West Virginia Code § 23-4-1(c). If a claim for treatments or benefits is denied by a self-insured employee, the employee is permitted to file a complaint with the Worker' Compensation Commissioner. See 85 C.S.R. 5-2.1. The employer can

be fined up to $5,000.00 by the Commissioner for any failure to properly pay benefits. See 85 C.S.R. 5-4.1.

8. In this case, ESC, acting on behalf of Chemical Leaman, denied a small portion of Mr. Wetzel's claims based upon lack of supporting documentation or because the treatment or medications indicated did not comport with ICD-9 code for the injury found compensable by the Commissioner. Out of seventy-nine requests for payment, ESC denied nineteen requests. Of the nineteen charges denied, nine were denied as being unrelated to Mr. Wetzel's compensable injury, exposure to TDI. Each of the nine bills denied as being unrelated had diagnosis code of rheumatoid arthritis and/or pneumonitis. Four of the nineteen charges denied were denied as being unauthorized by the Workers' Compensation Division and the remaining six charges denied as being duplicate charges. None of the bills denied were resubmitted for payment.

9. The amount of medical expenses paid on Mr. Wetzel's claim was $11,281.00. Several procedures and treatments were reduced in accorded with the West Virginia Worker' Compensation fee schedule. Those reductions totaled $1,437.33. Also, the employer's account was refunded $952.60 in regard to prescriptions for certain medications which were originally paid by ESC on behalf of Chemical Leaman in accordance with Worker' Compensation authorizations. However, the authorizations were overturned by the Administrative Law Judge, a decision that was upheld by the Appeal Board.

10. Plaintiff's Complaint set forth three causes of action against ESC regarding the denial of benefits described above: (1) Outrage Intentional Infliction of

Emotional Distress; (2) Violations of the Unfair Claims Settlement Practices Act (West Virginia Code § 33-11-4(9)); and (3) Negligence.

CONCLUSIONS OF LAW

1. Plaintiff's claims for negligence and outrage intentional infliction of emotional distress are barred as the Worker' Compensation system is plaintiff's exclusive remedy. See West Virginia Code § 23-2-6. West Virginia Code § 23-2-6 provides that any employer who pays into the workers' compensation fund "shall not be liable to respond in damages at common law or by statute for the injury or death of any employee however occurring." This immunity is extended to any agent of the employer. Specifically, West Virginia Code § 23-2-6(a) provides as follows:

> The immunity from liability set out in the preceding section (§ 23-2-6) shall extend to every officer, manager, agent, representative, or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

2. An agent is defined as "a person authorized by another to act for in place of him; one entrusted with another's business." Black Law's Dictionary, 6th Edition, page 41.

3. Chemical Leaman hired ESC to administer its self-insured Worker' Compensation benefits program so that it would not have to process claims on its own behalf (which it was required to do pursuant to West Virginia Code § 23-2-9. As such, ESC "acted in place of" or "conducted business" on behalf of Chemical Leaman and was, therefore, an "agent" or "representative" of Chemical Leaman.

Accordingly, because ESC was the agent of Chemical Leaman, it is entitled to the same immunities and protections under the Worker' Compensation system as Chemical Leaman.

4. The Worker' Compensation immunity extends to the handling of the claim for benefits by the employer or the employee's agent or representative unless Plaintiff can establish that the claim was handled fraudulently. See e.g. Persinger v. Peabody Coal Company, 474 S.E.2d 887 (W. Va. 1996) (even though plaintiff's claim was for alleged mis-handling of benefits and not for negligent injury, the exclusive remedy was still the workers' compensation system unless a very stringent test was satisfied); Cobb v. E. I. duPont deNemours and Company, 549 S.E.2d 657 (W. Va. 1999) (to overcome worker' compensation immunity with regard to the handling of a claim, plaintiff must satisfy essential elements of a fraud cause of action.)

5. In the instant case, plaintiff has failed to allege fraud at all, much less with the particularity required. Accordingly, as plaintiff has failed to produce any evidence that would overcome the immunity afforded to ESC under the Worker' Compensation system as an agent of the employer, Chemical Leaman, she cannot maintain a cause of action for negligence and/or outrage/intentional infliction of emotional distress against ESC.

6. The West Virginia Unfair Trade Practices Act, West Virginia Code § 33-11-1, et seq., is only applicable to those entities that are insurers or in the business of insurance. See Hawkins v. Ford Motor Company, 566 S.E.2d 624 (W. Va. 2002).

7. Chemical Leaman is a self-insured entity that is not in the business of insurance. Chemical Leaman engaged ESC to administer its self-insured Worker' Compensation benefit program. ESC is not an insurer in that it does not issue any insurance policies and is not in the business of insurance.

8. Accordingly, pursuant to Hawkins, plaintiff cannot maintain an action under the Unfair Trade Practices Act against ESC.

WHEREFORE, based upon the foregoing findings of fact and conclusions of law, this Court does hereby GRANT Employer Services Corporation's Motion for Summary Judgment and DISMISSES it from this civil action, with prejudice.

The objection of the Plaintiff is noted and exception saved.

The Court further ORDERS that the Clerk provide certified copies of this Order to all counsel of record upon entry.

ENTERED this 14th day of August, 2006.

Mark A. Karl
MARK A. KARL, JUDGE

A Copy Teste:

David R. Ealy, Clerk

By _____ Deputy

CERTIFICATE OF SERVICE

I, Tammy R. Harvey, as counsel for Employers Services Corporation of West Virginia, do hereby certify that a true and exact copy of the foregoing **"DEFENDANT EMPLOYERS SERVICE CORPORATION OF WEST VIRGINIA'S RESPONSE TO PLAINTIFF'S PETITION FOR APPEAL"** has been served this 12TH day of January, 2007, upon the following counsel of record, via United States mail, postage pre-paid, addressed as follows:

Christopher Regan, Esquire
BORDAS & BORDAS, PLLC
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Wheeling, WV 26003

TAMMY R. HARVEY (WV Bar No. 6904)

Flaherty, Sensabaugh & Bonasso, PLLC
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Charleston, WV 25301

EXHIBIT 2

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

MARY H. WETZEL, Individually and as Executrix of the Estate of ROBERT H. WETZEL,

Plaintiffs,

vs. CIVIL ACTION NO. 96-C-172K

EMPLOYERS SERVICE CORP. OF WEST VIRGINIA,

Defendant.

Deposition of **MICHAEL W. BLATT, M.D.**
Tuesday, January 10, 2006

The Deposition of **MICHAEL W. BLATT, M.D.**, called for examination by the Defendant, taken pursuant to Notice and the West Virginia Rules of Civil Procedure pertaining to the taking of depositions, before me, the undersigned, Elaine M. Bracken, Court Reporter Notary Public in and for the State of West Virginia, held at the offices of Bordas & Bordas, P.L.L.C., 1358 National Road, Wheeling, West Virginia, commencing at approximately 10:30 a.m. on the day and date above set forth.

Certified Copy
E.M. Bracken Associates

EKGs, emergency room visits at Wetzel County Hospital, pulmonary function test done at Wetzel, emergency room reports again at Wetzel County, chest X-ray reports, these are Dr. Emch's progress notes, there is a report of a rehabilitation coordinator, a Mr. Crawford I believe, and that evaluation, again the autopsy, this is return to work information, this is a letter Dr. Emch wrote to the Workers' Compensation Bureau, this is a letter from Claims Deputy Edward Boyle concerning Mr. Wetzel, this is the rehabilitation of Mr. Wetzel and the evaluation at Rehab Works, Dr. Wren's report again, my curriculum vitae, and that's all I have.

Q Okay.

A I do have notes that I brought, but --

MS. HARVEY: Just before we leave here, I'd like to get a copy of just his notes. I think I have everything else.

MR. REGAN: Okay.

BY MS. HARVEY:

Q Doctor, what's your understanding of what Employer Services Corporation's role is in this case?

A I really don't have any knowledge of

Employer Services Corporation. After reading through the progress notes or the workers' compensation notes, it's my under -- and the deposition of Ms. Howard and Mr. Maceicko, it's my understanding that there is a dispute as to payment and allowing for referral to various physicians and medications. My understanding is very limited and outside the realm of my professional capacity to understand what that means.

Q So, I would be correct in saying that you are not going to offer any opinion as to whether those payments should have been made or referrals should have been made or if you had that responsibility to do that; is that correct?

A I can deal with it from a professional component as to whether Dr. Emch should have referred or, um -- I can refer to it in that regard and as perhaps Dr. Emch's prescription medication as to whether they were appropriate or inappropriate or whether he did or did not do medications, but I am not going to testify as to who should be allowed what from a billing or from a standpoint of providing services of this nature. I don't feel capable of discussing that.

Q Okay, thank you, sir. Doctor, what was the cause of Mr. Wetzel's death based on your review of the documents?

A Mr. Wetzel died from multiple causes. There is direct acute causes and chronic causes that contributed significantly to his demise. He appears to have had myocardial infarction on the death certificate. He also had an aspiration of gastric contents, those were direct causes of Mr. Wetzel's case. Also direct causes of a chronic nature was Mr. Wetzel's underlying pulmonary fibrosis, his core pulmonality, his ischemic cardiac disease and general atherosclerotic vascular disease and his enlarged heart.

Q Do you have an opinion as to what caused Mr. Wetzel's chronic conditions that you just listed?

A I think there are several things that caused Mr. Wetzel's chronic conditions. I think we can say with reasonable medical certainty that Mr. Wetzel's pulmonary fibrosis was the result of his repetitive and chronic exposures to toluene diisocyanate. I also believe that he had cardiac sequela as a result of that and heart failure as a

CERTIFICATE OF SERVICE

I, Tammy R. Harvey, as counsel for Employers Services Corporation of West Virginia, do hereby certify that a true and exact copy of the foregoing **"BRIEF OF APPELLEE"** has been served this 11TH day of May, 2007, upon the following counsel of record, via United States mail, postage pre-paid, addressed as follows:

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